BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

Please refer to the petition under this heading for full statement of the opinions of the lower courts.

Jurisdiction.

Please refer to the petition under this heading for statement of the basis of jurisdiction of this Court.

Assignments of Error.

1. The Circuit Court of Appeals erred in reversing the first judgment when it appeared certain that if the same judgment were before the Supreme Court of Florida it would be affirmed.

2. The Circuit Court of Appeals erred in its first judgment reversing the judgment in favor of petitioner and holding that the coupons sued on by respondents were valid obligations of petitioner, said judgment being contrary to Florida law.

3. The Circuit Court of Appeals erred in holding that respondents could meet the burden of proving that the coupons in question were clipped from bonds executed by petitioner, and that they were genuine interest coupons issued by petitioner, by submitting the *ex parte* affidavit of a non-resident in which he said he clipped such coupons from bonds issued by petitioner.

Statement of Case.

Please refer to the heading, "Summary Statement of Matters Involved", in the petition, for a full statement of the case.

Summary of Argument.

POINT ONE:

The Circuit Court of Appeals erred in reversing the judgment of the lower court which held the bonds void, it ap-

pearing that the Supreme Court of Florida would have affirmed the same judgment, as it had affirmed a similar judgment holding identical bonds void. See *State ex rel. Vickery* v. *Mowat,* 193 So. 751, and appendix "C" for proceedings, and appendix "D" for statute, in that case. Appendix C page 53 is unreported opinion filed in the cause showing the question was the same as in the case at bar and that the lower court held the bonds void. The report (193 So. 751) shows the lower court was affirmed by an evenly divided court.

Assuming the question of validity of the bonds is evenly balanced in the views of the six Florida Justices, the most favorable view for opponents, then the views shown to have prevailed in the lower State courts, and in the lower Federal courts which, in matters of State law, really perform the functions of State courts, ought to prevail in the Circuit Court of Appeals. This must be the rule or confusion will exist. Moreover a "state is not without law save as its highest court has declared it. There are many rules of decision accepted and acted upon by the bar and inferior courts," which the Circuit Court of Appeals was "not free to reject", merely because they have not received the sanction of the highest Florida Court, even though it thinks such State rule as applied by the lower courts unsound or that another is preferable. *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146; *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176; particularly where, as here, there is no "convincing evidence that the law of the state is otherwise" than as applied in the lower courts. *Six Companies* v. *Joint Highway Dist. No. 13,* 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 159.

A judgment of a Circuit Court in Florida is presumed right in fact and law. *City of South Miami* v. *Landis,* 192

So. 624. And whoever challenges it on appeal has the burden of showing it is wrong. *Brooks* v. *Pryor*, 189 So. 675. Hence the judgment of the lower court in *State ex rel. Vickery* v. *Mowat*, 193 So. 751, holding similar bonds void is presumed correct, and that presumption cannot be overturned on an affirmance by an evenly divided court. The Circuit Court of Appeals should have indulged the presumption it was right. The function of that court is to correct misapplication of State law, but in this case it has itself misapplied State law, as established by lower court decisions which carry every presumption of correctness.

POINT TWO:

If it cannot be said that the Circuit Court of Appeals was bound by the established lower court rulings upon the question at bar, it erroneously misapplied the law upon this most important question, as evidenced by Florida Supreme Court decisions.

In the *Mowat* case, 193 So. 751, appendix "C", page 53, the three Justices who wanted to reverse the lower court stated that the invalidity of the bonds was supported by decisions of the Florida Court, and that they did not recede from that view, but for other reasons, it not appearing that to pay the bonds would materially interfere with the operation of the schools, they would not hold them void. The other three Justices dissented from the opinion prepared and voted to affirm the lower court which held them void. Thus three Justices hold unqualifiedly the bonds are void, while the other three say for all practical purposes they are void under previous decisions of the court. Had the Circuit Court of Appeals tried to find and follow the law of Florida, rather than make a decision it thought right, it need not have gone further than this case.

The Florida Court has consistently held that Boards of Public Instruction cannot issue bonds or notes payable in

future years out of the tax funds required to be raised by Section 8, Article 12, in order to raise money for current expenses of operating the schools, *Barrow* v. *Moffett*, 116 So. 71, or to equip school buildings, *Board* v. *Union School Furnishing Co.*, 129 So. 824, or to buy sites and erect school buildings in school districts, *Leonard* v. *Franklin*, 93 So. 688.

The building of schools is provided for under Sections 10, 11 and 17 of Article 12, and the school fund provided for in Sections 8 and 9 are pledged by the Constitution to operating existing schools. *State* v. *Board*, 170 So. 602. This was so stated and recognized by the Circuit Court of Appeals in a recent case from Florida. *Board* v. *Osburn*, 101 F. (2d) 919.

Where, however, deficits arise due to current operating expenses, including necessary repairs and furnishings, exceeding anticipated revenues, they constitute obligations of the board and when authorized by statute may be refunded by issuance of bonds, it not appearing budgetary requirements will be upset. *State* v. *Board*, 170 So. 602; *Board* v. *Osburn*, 5 Cir., 101 F. (2d) 919.

Bonds and other obligations issued contrary to the Constitution are void. *State ex rel. Vickery* v. *Mowat*, 193 So. 751; *Board* v. *Union School Furnishing Co.*, 129 So. 824; *State* v. *Greer*, 102 So. 739, and they are not made valid as to innocent purchasers by a validating decree. *State ex rel. Vickery* v. *Mowat, supra; State* v. *Town of Belleair*, 170 So. 434. Especially where they are on their face in conflict with statutory or constitutional powers. *Olds* v. *Alvord*, 191 So. 434, text 443; *Weinberger* v. *Board*, 112 So. 253.

POINT THREE:

Where it is alleged, in a suit against a public body, that interest coupons sued on were issued by and were clipped from bonds issued by that body, and such allegation is denied, there was a material issue. *City of Hialeah* v.

Groves, 5 Cir., 101 F. (2d) 951. And where it appears in said suit that such clipped coupons bore no signatures, except printed or lithographed ones, or other means of identifying them, and the defendant had sworn to such facts in response to a notice to admit their genuineness, the issue tendered as to the authenticity of the coupons was a genuine issue, and not a mere colorable or formal issue. If there is a genuine want of knowledge necessary to enable defendant to admit authenticity of the coupons, there was a genuine issue. *United States* v. *Gotham Pharmacal Co.*, 4 Fed. Rules Service 56, f. 21-1.

Under such circumstances it was a deprivation of defendant's rights of trial and cross examination for the court to enter summary judgment against defendant, without proof by plaintiff other than an *ex parte* affidavit, the burden of proving the authenticity of the coupons being on plaintiffs. The rule is not designed to provide a summary trial, but only to determine if there is a real issue to try. *Merchants Ind. Corp.* v. *Peterson*, 3 Cir., 113 F. (2d) 4; *Wynant* v. *Crittenden*, U. S. C. A., D. C., 113 F. (2d) 170. And certainly affidavits are not admissible to prove issues if they are genuine. See *Moore's Federal Practice*, Vol. 3, p. 3174, 3184, and authorities there cited.

ARGUMENT.

Point One: The Circuit Court of Appeals erred in reversing the judgment, it appearing it would have been affirmed by the Supreme Court of Florida, at least by an evenly divided court.

By the first assignment of error this question is raised: What should the Circuit Court of Appeals have done with a judgment which, if it had been rendered by a State Circuit Court and appealed to the State Supreme Court, would have certainly been affirmed, at least by an evenly divided court?

The Florida Supreme Court, when it decided *State ex rel. Vickery* v. *Mowat,* 193 So. 751, passed upon the validity of bonds identical to these at bar (see appendix "C" for proceedings and unreported opinion in that case, and appendix "D" for statute under which the bonds were issued). It was composed by law of six Justices, all of whom participated. The Circuit Court of Appeals admitted (112 F. (2d) 916) the *Mowat* case involved the same questions but held it was not bound because the judgment of the lower court holding the bonds void was affirmed by an evenly divided court. Three Justices, while stating that the contention that the bonds were void was supported by Florida decisions cited, voted to reverse the judgment, while the other three voted to affirm the judgment of the Circuit Court holding the bonds void.

We think that previous decisions of the Florida court establish that the bonds are void, that the reasons which the three Justices gave for voting to reverse the judgment are clearly contrary to apposite Florida decisions, hereinafter to be discussed, and that the bonds are in fact, under the Florida law, void, as the Circuit Court had held, and as half of the Supreme Court held, resulting in affirmance of the Circuit Court. But we shall save that question for argument under the next point, and address the question posed above. In the interest of uniformity between the Federal and State Courts, it would seem that when it appeared to the Circuit Court of Appeals that if the judgment then before it were before the Supreme Court of Florida, it would be affirmed, then the Circuit Court of Appeals ought to have affirmed it, whether or not it agreed with the law as applied by the lower State court.

When the case was before the Circuit Court of Appeals for decision on the validity of the bonds, the personnel of the Supreme Court had not changed since the decision in *Vickery* v. *Mowat,* and there was no reason to suppose or

believe that the attitude of the same six Judges on the Supreme Court had changed from what it was in the *Mowat* case. In such circumstances, was not the State Circuit Court judgment, in the *Mowat* case, entitled to great weight, and was not the judgment of the District Court of the United States, rendered by a Florida Judge sitting in Florida, entitled to great weight, as evidencing the law of Florida? The Circuit Courts of the State of Florida are next in rank to the Supreme Court, there being no intervening appellate court. Their judgments are presumed to be right, both in point of law and fact. *City of South Miami* v. *Landis,* 192 So. 624. In Florida, whoever appeals from a decree or judgment of the Circuit Court has the burden of showing the judgment was wrong, else it will be affirmed. *Brooks* v. *Pryor,* 189 So. 675. Where a case turns upon State law, the only object of the Circuit Court of Appeals is to correct misapplication, or erroneous application, of State law. It was not shown, and in view of the *Mowat* case it could not have been shown, that the district court in holding the bonds void misapplied the law of Florida. When a question has not been settled by the Supreme Court then a decision by a lower court is presumptively correct and ought to be accorded due weight. As this Court has said:

> "A state is not without law, save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable."
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> *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146.

The question here involved is of great importance in the proper administration of justice in Florida. It deals with and directly affects one of the most important functions of State government—namely, the operations, maintenance, and support of public free schools. Its solution can have a tremendous effect upon these functions of government.

It is "inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing," the law as adopted and applied in the lower courts of the State, should be the law in the Federal Courts and the Circuit Court of Appeals was not authorized to disregard this source of State law. *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176.

It so happens that since the Circuit Court of Appeals passed upon the validity of the bonds here involved, a constitutional amendment has been adopted in Florida, adding a seventh Justice to the Florida Supreme Court (see appendix "F"). An authoritative decision of the question in hand may now be had by that court, which would be binding upon the lower State courts and the Federal courts as well. Such decision would establish the law on this important question. Perhaps an appropriate disposition of the case would be to reverse the judgment of the Circuit Court of Appeals, with instructions for that court to affirm the judgment of Judge Akerman, but without prejudice to the right of respondents to sue in the State Court upon these coupons, and there obtain a settlement of the aggravated question. This course was directed by this Court in *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 60 S. Ct. 628, an opinion rendered by Mr. Justice Black. Such course would have two advantages: First, it would save the spectacle of having one rule applied in the Federal

Courts and another in the State Courts, while, second, it would allow respondent bondholders every opportunity of securing first-hand application of the State law to their controversy. To do this would not be to deprive the Federal Courts of their power to adjudicate controversies under the State law. It would not be to say to a litigant that the State Supreme Court can not decide your controversy and neither can we. It would be to say in the case at bar that the law of the State was so balanced that the Supreme Court, consisting of an even number of Judges could not decide the question, but now that same court consists of seven Judges, and they cannot evenly divide on the question, but are bound to reach an opinion that would settle the question for all courts, therefore, neither litigant will be foreclosed in a Federal Court in circumstances where, at any time, the Supreme Court of the State may have occasion to settle the question contrary to the way in which it was ruled in the Federal Courts.

Point Two: The Circuit Court of Appeals erred in holding the coupons valid notwithstanding the Florida law to the contrary.

This point is raised by assignment of error No. 2. As an abstract proposition this Court is perhaps not concerned with what the Florida law is. If, however, the doctrine of the now famous *Erie Railroad* case (304 U. S. 64, 58 S. Ct. 817), and subsequent cases, is to mean anything, then it is necessary that the Circuit Court of Appeals ascertain and follow the State law, whatever it is. In respect to the question in hand the State law is not a mere formula of words, into which a case must exactly fit in order for the Federal Courts to be bound. We are dealing with a State Constitution having a spirit, a meaning, and a background, which looks in the direction of, and has for its purpose,

the maintenance and operation of public free schools in the State, a most important function of State government.

The Circuit Court of Appeals has on it no Florida Judge, and it may be difficult for it to place itself in the setting projected from these organic provisions. For this reason, perhaps, "This court looks to the trial court for the original examination of local questions and relies for aid upon the explanation of its conclusion." *City of Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188, 59 S. Ct. 448. Under the decisions of this Court, following the *Erie Railroad* case, it was obligatory upon the Circuit Court of Appeals to "ascertain from all the available data what the State law is," and what decision, if the case in hand were before the Florida Court, would be made, and then to make such decision, regardless of whether it thought the Florida law right. *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146. Absent a decision by the highest court of the State, the opinion of the Chancery Court, Circuit Court in Florida, is a binding source of State law. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176.

All Available Data and Evidence of State Law Point to Invalidity of Bonds.

The Supreme Court of Florida in *State, ex rel. Vickery* v. *Mowat*, 193 So. 751, as already mentioned, had before it the identical question here presented. The Circuit Court had held the bonds void and on appeal the Supreme Court affirmed by an evenly divided Court. In an opinion written by Mr. Justice Terrell (appendix "C", page 53), filed in the case but not reported, since the Justices evenly divided on it, it is said: "The sole question raised in the court below and brought here for determination is the power of the Legislature to authorize the use of the funds raised under Section 8 of Article 12 of the Constitution to pay in-

terest on and retire bonds so issued." It is then said: "It is contended by appellee that the judgment below should be affirmed because all school funds raised under Section 8 of Article 12 must be used for the support and maintenance of the public schools of the county and that no part of it can be used for the construction of buildings. This *contention is supported by the decisions of this court.*" (Italics ours.)

But Mr. Justice Terrell thought that the bonds having been so long issued, and it not appearing that payment of them would affect the operation of the schools the court should not declare them void at the instance of the Board, though "If payment * * * tended to disrupt the school term, we might be forced to hold them invalid." Two Justices agreed with him while three voted to affirm the lower court, as a result of which the lower court's judgment holding the bonds invalid was affirmed (193 So. 751).

It is contended that this case in and of itself is the strongest of evidence of what the law of Florida is on the question. To all intents and purposes it labels them "void". The lower court held them so. Half of the Supreme Court voted to affirm that holding. The other half said the contention that the holding should be affirmed was "supported by the decisions of this Court." United States District Judge Akerman, a Florida Judge, held the bonds at bar invalid. A showing that payment of the bonds would tend to disrupt the operation of the schools, a fact alleged in petitioner's ninth defense (R. 9803, p. 12), would undoubtedly have impelled Judge Terrell and the two Judges who concurred with him to hold them void.

It is illogical to determine the validity of the bonds by the subsequent state of the school treasury. They might be void now, valid next year, and void the year after that. It is not claimed there is any support for such principle as this in Florida law or any other law. On the other hand,

the decisions of Florida are such that if bonds are issued contrary to the Constitution, they are void, and cannot be validated. *Weinberger* v. *Board,* 112 So. 253. In *State* v. *Greer,* 102 So. 739, the Florida Court held bonds issued by the City of Quincy to build school buildings, which the City was not empowered to do, were void, "even in the hands of innocent purchasers," were not improved by validating statute, and the City was not estopped to assert their invalidity though it had got the money, built a school, and paid interest on the bonds for seven years.

In *State* v. *Town of Belleair,* 170 So. 434, the Florida Court held that bonds having issued "without legal authority, there can be no such person as a bona fide holder without notice." And in *Olds* v. *Alvord,* 191 So. 434, Text 443, the court held the bonds void in the hands of those claiming to be innocent purchasers, saying: "The issuing authority being without power to issue bonds, a judicial validating decree could not confer validity." In that case the bonds had been issued in 1924, they were first attacked in 1936 when the city was attempting to refund them (170 So. 434).

In *Board of Public Instruction of Lafayette County* v. *Union School Furnishings Co.,* 129 So. 824, the Florida Court held notes given by the Board of Public Instruction for school equipment, current expenses, were void, and not improved by direct legislative validating act, because the "obligations were assumed and executed in violation of organic law," saying:

> "(4) The framers of the Constitution protected the school fund in so far as it was reasonably possible to do so, and when contractors and vendors deal with a board of public instruction they know, or should know, that the authority of the board is limited and that it is not authorized to pledge its expected revenues for future years for the payment of current obligations. Therefore, when such contractors or vendors deliberately enter into a contract or agreement by

> which the future revenues of the board are attempted to be pledged for the payment of current expenses, they do so at their peril, and they know, or should know, that they have neither moral nor legal right to expect such obligations to be paid from funds to be raised in the future, which funds are provided for the current maintenance of the public free schools and for the benefit of and for the use of those who are entitled to receive the benefits of the school during the annual period for the maintenance of which the fund is collected."

In the light of the decisions already discussed, and the numerous ones later to be referred to, there is no doubt that the lower courts of Florida are bound to hold as an original proposition that these or similar bonds are void. Whether the court should withhold judgment of invalidity is settled in apposite cases, above mentioned. A lower court would have to go in the teeth of these convincing decisions to agree with Judge Terrell, which cannot be expected. If, therefore, it be said there is no controlling decision by the Supreme Court of Florida requiring the Circuit Court of Appeals to affirm Judge Akerman, it may be said that the overwhelming evidence of State law is on the side of Judge Akerman and against the decision made by the Circuit Court of Appeals. There is no balanced doubt of this, and this evidence should control. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176. *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146.

The Circuit Court of Appeals found it unnecessary to discuss Florida decisions specifically touching the question, preferring to stand on a memorandum opinion which did not even disclose what the case was about (*Warren* v. *Board of Public Instruction*, 97 So. 384) and an asserted policy of fidelity to the sanctity of contract in the absence of clear law to the contrary (112 F. (2d) 914), citing authority not even remotely in point with the case in hand. It is fairly

clear that the Circuit Court of Appeals thought itself free to decide the case as it wished. The result is that by accident of Federal jurisdiction the bonds are valid in the Federal Court, void in the State Court.

Background and Spirit of Article 12 Constitution of Florida.

The Florida Court has held the consistent view that the County Boards of Public Instruction may not issue bonds payable in future years against the taxes provided in Sections 8 and 9, for the purpose of raising revenue with which to pay current expenses of operating the schools, *Barrow* v. *Moffett*, 116 So. 71, or to equip buildings, *Board* v. *Union School Furnishing Co.*, 129 So. 824, or to pay salaries of teachers and other expenses of operation, *State* v. *Board*, 98 Fla. 1152, 125 So. 357, or to buy sites and build buildings in school districts. *Leonard* v. *Franklin*, 84 Fla. 402, 93 So. 688.

These provisions of the Constitution contemplate an annual budget of county school expenditures and the "whole policy of our public school system is that the operation of such schools is to be based upon each year's requirements and facilities." *Williams* v. *Board*, 182 So. 837. The Constitution expressly commands that the county school fund provided by Sections 8 and 9, shall be disbursed solely for the maintenance and support of public free schools and clearly does "not contemplate that a large portion of such annual tax shall be pledged or used to liquidate long-term interest bearing warrants to be sold and the proceeds used to aid in the building and equipment of high school buildings in special tax school districts in the county, when Section 10 authorizes a special district tax to be used under Section 11 for building or repairing school houses" in the district. *Leonard* v. *Franklin*, 93 So. 688.

Of course, if at the end of the school year the costs of operating have exceeded the anticipated revenues for that year so that there remains unpaid salaries, or other unpaid items, this is an obligation which must be paid and for which the Board may be sued. *Board* v. *Kennedy*, 147 So. 250, and the accumulation of such deficits may be refunded when authorized by statute, it not being shown that the bonds would violate budgetary requirements or materially disrupt the operation of the schools, *State* v. *Board*, 170 So. 602; *Board* v. *Osburn*, 5 Cir., 101 F. (2d) 919.

The Fifth Circuit Court of Appeals has not always seen eye to eye with the Florida Court in its construction of the school law. See *Board* v. *Gillespie*, 5 Cir., 81 F. (2d) 586, where that court said the decisions of the Florida Court in reference to want of power of the Boards to issue bonds had the effect of writing an implied prohibition into the Constitution which it confessed its inability to find (text 589), and its unwillingness to follow. The Florida Court took note of this in *State* v. *Board*, 170 So. 602, saying:

> "We do not take issue with this pronouncement of our brethren from the Federal bench except to state that a more accurate knowledge of the history and purpose of Article 12 would doubtless have led them to a different conclusion."

The court then goes on to give the background of Article 12 (170 So., text 605), pointing out that it was adopted in 1885 when Florida had little more than quarter of a million people, no towns with as many as ten thousand, and schools in towns were built by private subscription while in the country some patron would donate the lot, the Board would furnish the material and the patrons would meet and "raise" the school house; that when "adopted, Article 12 provided only for present needs, which were primarily current expenses," and that future needs were left to be provided for by amendment, and at least seven amendments

had been added for that purpose; that when adopted, Sections 4, 6, 8 and 9 created and provided for the distribution and use of a general county school fund, while Sections 10 and 11 provided for districts and for taxation by them, which were authorized to be used in "building and repairing school houses" and other school purposes; that in 1912, demands for facilities having increased so greatly, Section 17 was added which, when implemented by legislation prepared by the writer of that opinion, made further provision for taxation by districts for acquiring, building, enlarging "school buildings" and other school purposes; that the consistent practice had been to use the county school fund for current maintenance purposes, the special school district fund raised by Section 10 for maintenance, building repair, etc., and the fund raised by Section 17 for interest and retirement on bonds for building, furnishing or otherwise permanently improving school buildings; that it would be competent for the Legislature to direct the use and appropriation of the county school fund, so long as done "solely for the support and maintenance of public free schools," but the Legislature "is without power to appropriate general county funds for school purposes or to appropriate county school funds for buildings in special tax school districts."

The last quotation above is preclusive of the question of validity of the bonds at bar, because by stipulation (R. 9461, p. 16) it is agreed that the school house was built in a special tax school district, couldn't have been built in the county without being in one or another of its districts, because all territory in the county was in one or another, and the proceedings creating the districts were matters of public record in the county.

Judge Terrell wrote the opinion of the court in the case, *State* v. *Board*, 170 So. 602, just discussed, which covers the field of school financing, and reviews and reconciles previous

decisions. He prepared an opinion in the case of *State ex rel. Vickery* v. *Mowat* (Appendix "C", p. 53), 193 So. 751, in which he and two judges (concurring with him) readily conceded that the contention that the bonds, identical with these at bar, were void was supported by *State* v. *Board*, 170 So. 602, while the other three judges unqualifiedly held them void.

The Fifth Circuit Court in *Board* v. *Osburn*, 101 F. (2d) 919, passing on bonds issued by the Board to refund deficits, and in marking out the fields in which bonds might or might not be issued under the provisions of the Florida Constitution, as interpreted by the Florida courts, had no trouble then understanding the law. It said:

> "In the opinion of the Supreme Court of Florida these provisions (referring to Sections 8 and 9 of Article 12) contemplate an annual budget, to be used only for current expenses, and not to be pledged in future years to the payment of bonds and the interest on them, nor encroached on presently to build houses or obtain permanent equipment for which other sections of the Constitution make special provision."

PRINCIPLES ENUNCIATED BY FLORIDA COURT SAFEGUARDING SCHOOL FUND.

The school funds under our Constitution "are to be regarded as a sacred trust; and the provisions of law safeguarding expenditures from such funds must be strictly construed." *McKinnon* v. *State*, 70 So. 557. And the fund raised by taxation under Section 8, Article 12, must be used solely for the support of the schools. It is "a special fund set apart for a specific purpose, expressly limited by the words maintenance and support of public schools." *Clifton* v. *State*, 79 So. 707.

The Constitution contemplates an annual budget of county school expenditures, and "does not contemplate that interest bearing time warrants or bonds shall be issued and

sold to raise county school funds for the support and maintenance of public free schools. *State* v. *Board*, 125 So. 357. Nor to aid in building school houses in special school districts. *Leonard* v. *Franklin*, 93 So. 688. The object is to keep this fund free of pledges so that it may be available for "present needs". *State* v. *Board*, 170 So. 602; *State* v. *Board*, 125 So. 357.

The payment of teachers' salaries "should be deemed the first duty of boards of education and these should be paid in preference to any other claims against the funds raised and appropriated for maintenance of public free schools." *State* v. *Hobbs*, 158 So. 434. Sections 10, 11, and 17 make ample provision for building school houses. *State* v. *Board*, 170 So. 602. The whole policy of our public school system is that operation of the schools is to be based "upon each year's requirements and facilities", and a bus driver's contract to run over a period of three years is invalid. *Williams* v. *Board*, 182 So. 837.

Purchasers of obligations issued by Boards of Public Instruction "know, or should know, that the authority of the Board is limited", *Board* v. *Union School Furnishing Co.*, 129 So. 824. Those who take notes and obligations of the Board do so "at their peril", because "The first duty of the Board of Public Instruction was to operate the schools of the county during the involved year." *Sholtz* v. *Board*, 174 So. 226.

Neither a county, *State* v. *L'Engle*, 24 So. 539, nor a city, *Munroe* v. *Reeves*, 71 So. 922, has power under the Florida Constitution to issue bonds for the purpose of erecting school houses.

Meaning of "Support" and "Support and Maintenance", in Relation to School Funds.

The interpretation by the Florida Court of the phrase "support and maintenance" of the free schools and the

limitation of the taxes raised for this purpose under Sections 8 and 9 to current operating expenses, excluding the buying of sites and erecting school buildings, is reinforced by a well-nigh unanimous line of decisions from other States. Sec. 60 C. J., page 1173, where the word "support" is defined as follows:

> "(No. 5) D. Used in respect of schools 'support' has reference to their maintenance."

The building of a new school house and the purchase of sites do not come within * * * any well-defined acceptation of "support of the common schools." Both the terms "support" and "current expenses" mean continuing regular expense when applied to public schools. *Sheldon* v. *Purdy* (Wash.), 49 Pac. 228. When congress declared in the admission act that the interest or income on the public school fund could only be expended in the "support" of the schools, it was not intended that any portion of it should be used in the erection or equipment of buildings, "but only for current expenses—the support and maintenance of the school for ordinary, annual expense." Otherwise such grants might be exhausted in the erection of magnificent buildings rather than in the education of the children. *Roach* v. *Gooding* (Idaho), 81 Pac. 642. The language of the Idaho court regarding the erection of magnificent buildings at the cost of educating the children was an accurate forecast of what will happen in Hernando County if the bonds are valid. See ninth defense (R. 9803, p. 12). In *State* v. *McMillan* (N. Dak.), 96 N. W. 310, the court struck down bonds in circumstances like those in the case at bar. Other cases directly in point: *Mitchell* v. *Colgan* (Calif.), 54 Pac. 905; *Love* v. *Rockwell Independent School District* (Tex.), 194 S. W. 659; *Crabb* v. *Board of Trustees* (Ky.), 116 S. W. 706; *Lee* v. *School Trustees*, 36 N. J. Equity 581; *Riesen* v. *School District, No. 4* (Minn.), 212 N. W. 783;

Horn v. *Paragould Special School District No. 1* (Ark.), 57 S. W. (2d) 568.

In Florida the word "support" was at an early date defined as follows: "to support means 'to sustain, to supply funds for the means of continuing, as to support the expenses of Government.'" Opinion to the Governor, 13 Fla. 688.

In Florida "support and maintenance" in relation to schools refers to current expenses, *State ex rel. Vickery* v. *Mowat*, 193 So. 751 (appendix "C"): *State* v. *Board*, 170 So. 602; *Board* v. *Osburn*, 5 Cir., 101 F. (2d) 919. This, of course, does not mean that repairs and furnishings necessary to current use may not be paid, or that that part of present repairs or extensions, which will be serviceable in future years may not be charged to the fund for such years. *Whitmore* v. *Brown* (Cal.), 279 Pac. 447, text 451, where the court said:

> "The conclusions we have thus arrived at are not intended, however, to be given such a narrowness of application as to wholly forbid the application of school moneys derived from taxation to such uses as that of making those ordinary repairs in existing school structures as are required for their adequate use during the current year, or as are by such use made necessary for like uses in the succeeding year; nor to emergency provision of such structures, temporary in character as the immediate needs of the department require during any particular period. But the erection of such permanent buildings as are contemplated by this tax cannot be brought by any rational interpretation within the otherwise limited meaning of the word 'support.'"

See also text page 604 of 170 Southern, where the Florida court explained *Warren* v. *Board of Public Instruction*, 97 So. 384, relied upon by the Circuit Court of Appeals for its decision, as being of this class. A copy of the act under

which the bonds in the *Warren* case were issued is attached hereto as appendix "E", from which it clearly appears that an enlargement of an existing building was authorized, that the fund from which they were to be paid was limited to not more than one half mill on the taxable property of the county, which was to be provided from the county school fund. The bonds in question are not limited to any specified part of the school fund, and they were issued to buy a site and erect a new building. This fact is recited upon their face (R. 9803, p. 8), and whoever bought them was charged with notice of such fact, and of their consequent invalidity. *Olds* v. *Alvord,* 191 So. 434, text 449. *Sutliff* v. *Lake County Commissioners,* 147 U. S. 230, 37 L. Ed. 145.

To uphold these bonds is to do violence to the letter and spirit of Article 12, to frustrate its settled meaning and policy. It is to snap the chain that holds the schools to a firm anchorage—to set the public free schools of the State adrift to be buffeted around by every wind and wave that may arise on a political sea. To hold them invalid will hurt their present owners. Still it is not as if they would lose all, for no doubt a court of equity would, as it has before, give them a lien upon the building into which their money went. *Nuveen* v. *Board,* 5 Cir., 88 F. (2d) 175, a Florida case. But if they could have no relief, as said by the North Dakota court in a similar case, their hurt will be of "small consequence compared with the permanent injury which would be done to the people of the state if the courts, to which they have committed the preservation of their constitutional rights and the integrity of the Constitution itself, should fail in the performance of their duty." *State* v. *McMillan,* 96 N. W. 310.

Point Three: The court erred in sustaining the summary judgment.

Rule 56 (c) provides for summary judgments in given cases. It says that the judgment sought shall be rendered

if the pleadings, depositions and admissions on file, together with the affidavits, if any, show "there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

This is to say that there must be a material fact put in issue, and that such issue must be genuine, as opposed to colorable, or sham, else judgment will be entered. There are two elements, materiality and genuineness.

The denial that the coupons were clipped from bonds issued by petitioner certainly was material, because if the denial was true petitioner owed nothing on them. *City of Hialeah* v. *Groves*, 5 Cir., 101 F. (2d) 951. This would seem so self-evident as to justify no further discussion.

The only other inquiry is whether the issue was a sham or whether it was genuinely tendered. Bad faith in filing this defense should not be presumed, yet it was nowhere asserted by respondents in their motion (R. 9803, p. 17). One who denies he signed a note may be held to have filed a sham plea when the note with his signature on it is produced before the court. Emphatically that is not the situation here. Petitioner did not deny it issued any bonds, or any coupons.

The complaint shows that respondents sued on coupons which they claimed were clipped from bonds issued by petitioner; that the coupons were not signed by petitioner, but that they bore only lithographed signatures—signatures put upon the coupons by machine (R. 9803, p. 5). See also stipulation (R. 9803, p. 34-a). Without saying they were, it may be said that such machine made coupons are capable of being exactly reproduced, so that petitioners could not tell the real from the reproduced, as it stated on oath it could not (R. 9803, p. 15), there being no way petitioner could identify them so as to admit their genuineness. Throughout the Rules of Civil Procedure runs the idea that

a want of knowledge as to a fact, so stated, is equivalent to denial of such fact.

Under these circumstances was petitioner required to obligingly admit the coupons were clipped from bonds executed by it. The only inference to be drawn from the decision of the Circuit Court of Appeals is that petitioner could not in good faith deny they were. Petitioner is a public body. It owes the citizens it represents the duty of exercising all prudence and caution, and to hold that it could not genuinely deny facts which it could neither know, or reasonably ascertain, is to establish a principle not permissible in a jurisprudence that proceeds on caution and hears before it condemns. The defense was filed in good faith. It was a genuine issue. It was material. This ought to have ended the summary judgment motion.

But it is said that respondents attached to their motion an affidavit of Mr. Bowerman of Cook County, Illinois, in which he said he clipped these coupons from bonds issued by petitioner. So they did (R. 9803, p. 19). Is it going to be held that *ex parte* affidavits are admissible to prove material and genuine issues? In an ordinary trial a party would be laughed out of court who tried to prove his case by affidavits. Yet he is no more entitled to do it because he is moving under summary judgment procedure. No such purpose is attributable to this rule. The purpose of the rule is to afford a method of determining whether there is a genuine material issue to try—not to try such an issue in a summary way on affidavits. *Merchants Indemnity Corp.* v. *Peterson*, 3 Cir., 113 F. (2d) 4; *Wynant* v. *Crittenden*, U. S. C. A., D. C., 113 F. (2d) 170.

There is a sort of notion growing up in some of the lower courts that affidavits may on summary judgment procedure be used as evidence to prove the issues made by the pleadings. *Cudahy Packing Co.* v. *United States*, 37 Fed. Supp. 563, text 569, is illustrative. This is a mistaken and a dan-

gerous notion. So far as we can find this Court has not passed upon this question.

Moore's Federal Practice, Vol. 3, page 3174, discusses the question thus:

> "To attain this end, the rule permits a party to pierce the allegations of fact in the pleadings * * * where there are no genuine issues of fact to be tried. The court is authorized to examine the evidence, not for the purpose of trying the issue but to determine whether there is a genuine issue of fact proper for trial."

And again on page 3184:

> "Thus it is often repeated that 'the court is not authorized to try the issue (of fact), but is to determine whether there is an issue to be tried.' Other cases caution that the court should not pass on questions of credibility or weight of evidence and that the summary judgment procedure 'should not be perverted to the trial of disputed questions of fact upon affidavits.'" See also pocket supplement, page 85.

The Circuit Court of Appeals never said in so many words that the issue was or was not genuine. It did say it was permissible to meet it by affidavit, as was done, there being no counter affidavit filed by petitioner.

It can hardly be said no counter affidavit was filed. Respondents served petitioner with a notice to admit the genuineness of the coupons (R. 9803, p. 13). This was answered under oath (R. 9803, p. 15) and served on respondents August 19, 1940 (stipulation, R. 9803, p. 34-a), the very day notice of motion for summary judgment was served (R. 9803, p. 17). In this answer petitioner said under oath that the coupons were not attached to any bonds issued by it and it could not admit they were genuine because they "do not bear upon their face any means of identification." This left the issue of their genuineness stand-

ing. If an issue as to whether the printed coupons were the obligations of petitioner can genuinely be made, then it was made and it subsisted throughout the proceeding. The only office of the Bowerman affidavit was to meet and overcome that issue. To thus use affidavits is no more justified on summary judgment procedure than on a regular trial.

The *bona fides* of the issue were not impeached, nor even attacked, by the Bowerman affidavit, or otherwise. He deposed that he clipped the coupons from bonds issued by petitioner (R. 9803, p. 19). That may be true or it may not. He may have thought the bonds he clipped them from were issued by petitioner, but they might not have been. His affidavit lets him be the judge of all these matters, and at the same time protects him against cross-examination in case he is purposely or innocently wrong. Petitioner could hardly be expected to state under oath that Bowerman was wrong, either by mistake or on purpose. Its position was that it didn't know, that it had a right to test Bowerman by cross-examination. If there had been irregularity in some of these coupons, this would not justify an oath that Bowerman's affidavit was false. If no irregularity in them had yet appeared, this did not mean that Bowerman swore the truth. The fundamental fact is that before the door was closed by judgment there should have been a trial and an opportunity to cross-examine Bowerman. If in the future someone else should show up with coupons corresponding to these in suit still attached to bonds issued by petitioner, there would be no defense to them. The court ought not to have entered judgment until opportunity to exclude such possibility had been afforded. It is not necessary to say such a thing will happen, for it condemns the judgment to say it possibly can happen.

Conclusion.

It is earnestly contended:

(1) That the Circuit Court of Appeals was bound by lower Florida Court decisions holding the bonds void, the Supreme Court being divided evenly, and that it erred in disregarding this binding source of State law, which is presumed right by the Supreme Court of Florida until the contrary is shown; that the contrary could not be shown to the Circuit Court of Appeals, it appearing the Florida Court was evenly divided; and that due regard for such lower court rule on the question at bar would have led to affirmance and not reversal of the judgment entered in favor of petitioner by the District Court (Point One);

(2) That the evidence of State law found in the *Mowat* case and prior cases leaves no substantial doubt that the bonds at bar are void and that the Circuit Court of Appeals should have so held (Point Two);

(3) That summary judgment was erroneously entered against petitioner (Point Three); and

(4) That the judgments of the Circuit Court of Appeals should be reviewed and reversed.

Respectfully submitted,

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